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SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 446

MICHAEL GLUS,

Petitioner,

—against—

BROOKLYN EASTERN DISTRICT TERMINAL,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

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Opinions Below

The opinion of FREDERICK VAN PELT BRYAN, Judge of the United States District Court for the Southern District of New York, is reported at 154 F.Supp. 863.

The *Per Curiam* opinion of the United States Court of Appeals for the Second Circuit is reported at 253 F.2d 957.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). The time factors upon which such jurisdiction rests is set forth under 28 U.S.C. Sec. 2101(c).

Statutes Involved

45 U.S.C. 56

"No action shall be maintained under the chapter unless commenced within three years from the day the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

45 U.S.C. 55

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* that in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Federal Rules of Civil Procedure Rule 9(b)

"Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Questions Presented for Review

1. Whether a cause of action under the Federal Employers' Liability Act, 45 U.S.C., Section 51, *et seq.*, is forever lost upon the expiration of the three-year period of limitations, or whether the right remains alive if Plaintiff's failure to sue within three years is brought about by Defendant's fraud or misrepresentation upon which Plaintiff relied.

2. Whether 45 U.S.C. Section 55, estops Defendant railroad from raising the defense of the statute of limitations where Plaintiff's delay in instituting suit is brought about by Defendant's fraud or misrepresentation upon which Plaintiff relied.

3. If fraud or misrepresentation tolls the statute of limitations in action under the Federal Employers' Liability Act, then whether Plaintiff's complaint adequately sets forth such a cause of action consistent with the Federal Rules of Civil Procedure 9(b), or whether Plaintiff need amend his complaint.

Statement of Case

Petitioner, Michael Glus, started employment with respondent Brooklyn Eastern District Terminal, in July, 1946. He was assigned almost exclusively to unloading bags of

flour from freight cars. The flour came in various sizes covered with bags of paper, cloth or burlap. As a result of this unloading activity there was always a considerable amount of flour dust in and about the freight cars caused by torn bags, seepage, and faulty packaging. No safety masks or protective devices were provided to employees who carried out these unloading duties in the area of the flour dust.

In July, 1951, petitioner Glus noticed that the flour dust was causing him to continually choke while working. It became difficult for him to breathe and his appetite fell off. He reported his condition to his foreman and arrangements were made for him to see a company doctor. After examining Glus the company doctor prescribed light duty. However, the doctor's advice was not followed by the Company and he continued to be assigned his regular duty of unloading flour.

During this period—1951 and 1952—at various times, his foreman, general superintendent, and the company claim agent advised him that his condition was not serious and that even if it were, he had seven years within which to bring suit against his employer, the Railroad.

Glus' symptoms steadily worsened. He was unable to continue working, and in July, 1952, he was forced to seek welfare assistance from the City of New York. In the same month he was examined at Greenpoint Hospital in Brooklyn, New York City, and then and there for the first time was told that he was suffering from a serious case of bronchial asthma as a result of his work.

Glus was last able to work for Brooklyn Eastern District Terminal on January 9, 1953. Thereafter, on March 9, 1953, he began work as a warehouseman for Norcross, Inc., a greeting card firm, where he is employed today. The atmos-

phere at his present job is clean and he does the light work as best he can except for regular heavy attacks of bronchial asthma.

Relying on the statements made by his foreman, superintendent, and the company claim agent, Glus withheld suit. Finally, in January, 1957, he was hospitalized at Roosevelt Hospital in New York City, for nine days following the most serious attack—a near fatal flareup of bronchial asthma. Since that time he has continued to attend regularly at Roosevelt Hospital for injections and treatment. On April 23, 1957, for the first time, Glus sought the advice of counsel and the within suit under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, was instituted nine days later in the United States District Court for the Southern District of New York, on May 2, 1957.

Condensation of the Argument

1. Legal analysis and sound public policy dictate that fraud or misrepresentation should toll the statute of limitations in a Federal Employers' Liability Act action.

2. Such a rule would merely place injured railroad employees in the same position that they were in prior to the passage of the Federal Employers' Liability Act so far as being permitted to raise equitable estoppel to the defense of the statute of limitations.

3. The purpose of the Federal Employers' Liability Act of avoiding a multiplicity of different state statutory periods would not be affected by permitting an equitable estoppel exception to the uniform three-year statute of limitations.

4. Whether there was fraud or misrepresentation sufficient to toll the statute of limitations in the instant action is a question of fact to be determined at trial.

5. Judgment for Defendant should be reversed and Plaintiff permitted a determination of the issues at trial.

POINT ONE

Legal Analysis and Sound Public Policy Dictate That Fraud or Misrepresentation Tolls the Statute of Limitations in a Federal Employers' Liability Act Action.

In *Tora* v. *New York, N.H.&H.R. Co.*, S.D.C.D. Mass., 108 F.Supp. 564, Plaintiff, a railroad employee, sustained an injury in August, 1947. His complaint was filed in March, 1952, after the statute of limitations had expired. The Defendant moved for summary judgment on the ground that the action had not been timely brought. Plaintiff replied that he had been fraudulently induced not to bring his action within the three-year statute of limitations by reason of false representations of fact made by Defendant. Wyzanski, *D.J.*, in holding for Plaintiff analyzed the reasons to support such a view:

> "1. The words of the statute do not give a plain command . . . Congress did not use the familiar formula which has been repeatedly held not merely to bar the remedy, but also to destroy the liability."

Section 6 of the Federal Employers' Liability Act, 45 U.S.C. Section 56 provides:

> "2. The broad policy of the Federal Employers' Liability Act is to create for a railroad employee injured through his employer's negligence, a cause of action under Federal Law which would be at least as generous as the typical state common law cause of action, available to other types of employees . . . It would there-

fore, be anomalous if the Federal Law was less favorable than the State Law to a defrauded employee. Yet it is clear under State Law that limitations of negligence actions are usually construed as subject to an exception benefitting a defrauded plaintiff. The defendant is, as the cases say, 'estopped from raising the defense of the statute of limitations, *Bergeron* v. *Mansour*, 1 Cir., 152 F.2d 27.'"

"3. Any contract or device whatsoever (presumably including a fraudulent representation), the purpose of intent of which shall be to enable any common carrier to exempt itself from any liability (is forbidden by the Act) 45 U.S.C. Section 55. And that and other provisions of the Act have been interpreted as precluding carriers from benefitting from releases they secured from deceived or overreached employees. (citing cases) A Congress which refused to allow a railroad employee to lose his right as a result of a fraudulently procured release, presumably did not expect a railroad employee to lose his right as a result of a fraudulently procured release, presumably did not expect a railroad employee to lose his right as a result of a fraudulently induced delay in bringing suit."

"4. . . . Purpose of Federal Employers' Liability Act statute of limitations was to avoid a multiplicity of different state statutory periods. This is not adversely affected by recognizing, also on a rational basis, the customary equitable estoppel exception to periods of limitation governing personal injury actions."

Judge Wyzanski added that broad statements regarding whether the statute of limitations affected right or the remedy are not made where fraud is alleged but are made where a novel cause of action is involved. The cause of action under the Federal Employers' Liability Act is closely

akin to the familiar common law action of an employee against his negligent employer—an action where fraud tolls the statute.

Defendant's motion to dismiss was denied.

One purpose in setting forth a time limitation under the Act is to have one uniform statutory period of limitation to avoid having each state separately applying its own different limitations. This purpose is not defeated or diminished when fraud is held to toll the statute.

In his opinion, below, in the within action, Bryan, *D.J.*, enumerated the aforementioned reasons as supporting the proposition that fraud tolls the statute and acknowledged:

"The reasoning . . . is not unpersuasive." (R.6)

There is no doubt that the Court has the power to toll the statute of limitations in a Federal Employers' Liability Act action. The sole issue is whether and in what circumstances it will choose to exercise that power. In *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743, a suit in equity was brought to enforce liability imposed on shareholders of a bank under Section 16 of the Federal Farm Loan Act. The bank had closed its doors in 1932 and suit was brought in 1943. Since the Federal Act had no statute of limitations, the state statute of ten years was applicable. The defendant urged the statute of limitations and laches. Mr. Justice Frankfurter, speaking for this Court, held:

"Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old Chancery Rule that where a plaintiff has been injured by fraud and 'remains in

ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' *Bailey* v. *Glover*, 21 Wall (U. S.) 342, 348, 22 L.Ed. 636, 638; and see *Exploration Co.* v. *United States*, 247 U.S. 435, 62 L.Ed. 1200, 38 S.Ct. 571; *Sherwood* v. *Sutton*, (CC) 5 Mason 143, Fed. Cas. No. 12,782.

"This equitable doctrine is read into every federal statute of limitations."

Osbourne v. *United States*, CCA 2, 164 F. 2576, was cited by the District Court below to support its holding that fraud does not toll the statute of limitations in a Federal Employers' Liability Act. However, its particular facts and holding suggest the opposite. In *Osbourne*, plaintiff sued to recover for injuries sustained while a member of a crew. Plaintiff was interned by the Japanese on December 8, 1941. Prior thereto he had sustained an injury. Plaintiff was able to commence suit on July 31, 1946. The defendant raised the defense that the two-year statute of limitations under the Suits in Admiralty Act and the three-year statute of limitations under the Jones Act had expired. The Circuit Court of Appeals for the Second Circuit stated:

". . . All statutes of limitations are based on the assumption that one with a good cause of action will not delay bringing it for an unreasonable period of time; but when a plaintiff has been denied access to the courts, the basis of the assumption has been destroyed. Whatever the reasons for describing this type of statute of limitations as substantive rather than procedural--

and we suspect the chief reason was to move the period of limitation named in the statute, rather than that of the forum control in cases brought in state courts—we think we do the distinction no violence by holding that either type of statute will toll for one who is a prisoner of the enemy in time of war."

But if someone is a prisoner of the enemy in time of war and is held to be denied "access to the courts" it is the result of the intervening cause of a third party. A plaintiff who is misled as to his rights by a defendant's fraud is just as much "denied access to the courts." The reason for following the rule in *Osbourne* is then even more compelling since there is no intervening cause of a third party. The sole cause is the very act of the defendant itself and from this wrongful act it should not benefit.

While there are cases in other circuits that support the decision of the Second Circuit Court of Appeals in the instant case, *Damiano* v. *Pennsylvania R. Co.*, CCA 3, 161 F.2d 534, Cert. Denied, 322 U.S. 762; *Rohner* v. *Union Pacific Railroad Company*, CCA 10, 225 F.2d 272; *Bell* v. *Wabash Ry. Co.*, CCA 8, 58 F.2d 569; there are well-reasoned recent decisions to the contrary.

In *Scarborough* v. *Atlantic Coast Line R. Co.*, CCA 4, 178 F.2d 253, Cert. Den., 339 U.S. 919, 94 L.Ed. 1343, 70 S.C. 621, the defendant's claim agent told infant plaintiff's father that he could wait until the infant, a railroad employee, was 21 before settling his claim. When the infant reached his majority and suit was instituted, the defendant railroad raised the statute of limitations as a defense. Judge Dobie, speaking for a unanimous court, stated:

"And nothing is better settled, as a general principle, than the rule that wherever found and in whatever guise, fraud will, in some way or manner, never be

permitted to give an inequitable advantage to the one who has consciously perpetrated the fraud."

"The decisions in the Osbourne and Frabutt cases . . . show clearly that there is a chink in the supposedly impregnable armor of the substantive time limitation of the Act. If, as those cases decided, there is one exception (war), surely the infinite variety of human experience will disclose others."

"It has often been said that a primary purpose of statutes of limitations in general has been the prevention of fraud. It is freely conceded by appellee here that fraud will toll the running of the so-called remedial statute of limitations. We cannot see a distinction and a difference, so clear and so real, between the two classes of statutes of limitations—the remedial and the substantive—as to justify the courts in giving effect to fraud in tolling the statute in one type (remedial) and then flatly denying that effect to fraud in the other type (substantive). The ancient maxim that no one should profit by his own conscious wrong is too deeply imbedded in the framework of our law to be set aside by a legalistic distinction between the closely related types of statutes of limitations."

Judgment for defendant was reversed and remanded.

Supporting this view on remedial and substantive statutes of limitations is *63 Harvard Law Review 711*:

"Thus, judicial extension of federal limitations periods . . . would not seem to impinge on the Congressional purpose. Reappraisal of the validity of the distinction between the two types of limitations seems desirable."

In *Fravel* v. *Pennsylvania R. Co.*, U.S.D.C. D. Maryland, 104 F.Supp. 64, the court permitted suit after an eleven

year interval despite a general release. Plaintiff, a railroad employee, sustained a back injury in July, 1940. A few weeks later the defendant railroad obtained a release for $50.00 on the strength of a representation that nothing was wrong with his back and that if any injury showed up they would compensate him. In 1951 plaintiff instituted suit after he discovered he had sustained a herniated intervertebral disc. The defendant invoked the statute of limitations, but the Court citing *Scarborough* held:

> "The rule grants relief against misrepresentation of this sort relied upon by the persons to whom they are made, whether made with intent to defraud or not."

The defendant's motion to dismiss the complaint was denied.

POINT TWO

The Question of Whether the Representations of Defendant's Foreman, General Superintendent and Company Claim Agent to Plaintiff Were Sufficient to Toll the Statute of Limitations Is One of Fact to Be Determined at Trial.

In *Scarborough* v. *Atlantic Coastline R. Co.*, CCA 4, 202 F.2d 84, the Court set forth the rule as follows:

> "The issue should be squarely left to the jury under an instruction that if the claim agent, Smith, made the erroneous statement to the Plaintiff as to the statute of limitations, with the intention that Plaintiff would rely on the statement, and, if also, the Plaintiff actually relied on this statement, delaying the institution of suit by virtue of such reliance, then this would effectually toll the running of the statute of limitations. There is no occasion for the use of the word 'fraud' in this instruction."

This Court should not pass on this point until testimony has been taken at trial and the issues have been fully explored and determined by the Court and jury.

CONCLUSION

Judgment for Defendant on the Pleadings Should Be Reversed and the Plaintiff Should Be Permitted a Trial on the Merits, Including the Issue of Fraud or Misrepresentation.

Respectfully submitted,

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